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ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

APPEAL FROM THE BLACKFORD CIRCUIT COURT
The Honorable Dean A. Young, Judge
Cause No. 05C01-0603-FB-15

NAJAM, Judge

STATEMENT OF THE CASE

Scott McIntire appeals his sentence following his conviction for Sexual Misconduct with a Minor, as a Class B felony, pursuant to a plea agreement. McIntire raises a single issue for review, namely, whether the trial court abused its discretion in sentencing him.

We affirm.

FACTS AND PROCEDURAL HISTORY

On March 26, 2006, McIntire had sexual intercourse with A.P. At the time, McIntire was twenty-one years old and A.P. was fourteen years old. On March 27, 2006, the State charged McIntire with sexual misconduct with a minor, as a Class B felony. At the initial hearing, McIntire pleaded not guilty and requested the appointment of pauper counsel. On April 4, 2006, the trial court appointed counsel for McIntire.

On June 26, 2006, McIntire filed his notice of insanity defense. On May 14, 2007, the trial court entered an Order Directing Evaluation of Sanity. Subsequently, Dr. Frank Krause and Dr. Craig Buckles evaluated McIntire and filed their reports on June 14, 2007, and June 27, 2007 respectively. Dr. Krause diagnosed McIntire as suffering from major depression (severe), borderline personality disorder, and intermittent explosive disorder. And Dr. Buckles diagnosed McIntire with “bipolar disorder, low intelligential functioning, and borderline personality disorder,” Appellant’s App. at 20, but both doctors concluded that McIntire’s symptoms would not have prevented him from appreciating the wrongfulness of his conduct.

On June 27, 2007, McIntire filed a request for change of plea hearing. The court held a hearing on August 27, 2007, at which McIntire entered a plea of guilty pursuant to a plea agreement and waived the thirty-day sentencing requirement. The trial court conditionally accepted McIntire's guilty plea pending receipt and review of the pre-sentence investigation report ("PSI").

The PSI was filed on September 17, 2007. On September 26, 2007, the court held the sentencing hearing and issued a written sentencing order, which provides in relevant part:

The Court finds the following aggravating circumstances:

- A. The defendant has a prior felony conviction for Burglary that occurred in Wells County, Indiana.
- B. That the defendant was on bond in this case while probable cause was found to believe that he committed the offense of Sexual Misconduct with a Minor pursuant to Case No. 05C01-0606-FA-27.

The Court finds the following mitigating circumstances:

- A. That the defendant is 23 years of age.

That the aggravating circumstances [outweigh] the mitigating circumstances and the defendant is sentenced to the Indiana Department of Correction[] for the advisory sentence of ten (10) years, with an additional ten (10) years for aggravating circumstances. . . . The defendant shall receive credit for 478 days of actual service in jail as a pre-trial detainee, or awaiting sentence (956 days including good time credit).

Appellant's App. at 26-27. McIntire now appeals.

DISCUSSION AND DECISION

McIntire contends that the trial court abused its discretion when it imposed a twenty-year sentence. Review to determine whether the trial court abused its discretion

in sentencing is a separate test from review of a sentence for inappropriateness under Indiana Appellate Rule 7(B). Although McIntire sets out Rule 7(B) as governing our review and authorizing revision of his sentence, if any, he does not frame his argument under that rule. Thus, he has waived any argument under Rule 7(B), and we review his sentence only for an abuse of discretion.

“Subject to the review and revise power under Indiana Appellate Rule 7(B), sentencing decisions rest within the sound discretion of the trial court and are reviewed on appeal only for an abuse of discretion.” Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007), corrected on other grounds, 875 N.E.2d 218 (Ind. 2007). An abuse of discretion occurs if the decision is clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom. Id. McIntire contends that the trial court failed to identify certain mitigators and considered an invalid aggravator. We address each contention in turn.

McIntire argues first that the trial court abused its discretion when it did not identify certain mitigators. Specifically, he contends that there was “unrebutted evidence presented at the sentencing hearing regarding the strong family support of Scott, Scott’s mental illness and Scott’s remorse[.]” Appellant’s Brief at 9. But McIntire has not cited the record to show where we might find and review that evidence. As such, he has waived the argument. See Ind. Appellate Rule 46(A)(8)(a) (requiring citation to the authorities, statutes, and the Appendix or parts of the Record on Appeal relied on). Additionally, McIntire did not argue to the trial court that his remorse was a mitigating

circumstance.¹ Thus, again, he has waived that argument for review. See McKinney v. State, 873 N.E.2d 630, 646 (Ind. Ct. App. 2007) (quoting Pennington v. State, 821 N.E.2d 899, 905 (Ind. Ct. App. 2005) (“A defendant who fails to raise proposed mitigators at the trial court level is precluded from advancing them for the first time on appeal.”), trans. denied).

McIntire also contends that the trial court abused its discretion when it considered as an aggravator that he was out on bond in this case when probable cause was found to believe that he committed another offense of sexual misconduct with a minor. In that regard, he argues that the trial court should not have “put any weight on the testimony of the mother of the alleged victim in the case that was dismissed.” Appellant’s Brief at 9. In support he cites to Neale v. State, 826 N.E.2d 635 (Ind. Ct. App. 2005). But in Neale our supreme court held that the significance of criminal history depends on the number of offenses and the nature and gravity of the prior offenses. Id. at 639. McIntire’s argument here, however, is based on testimony by an alleged victim’s mother in a dismissed case and not on his criminal history. Thus, Neale does not support McIntire’s argument. In any event, the fact remains that McIntire was out on bond when probable cause was found that he had committed another offense.

Affirmed.

BAILEY, J., and CRONE, J., concur.

¹ McIntire’s counsel argued to the trial court that McIntire “accept[ed] culpability” for the instant offense. By accepting responsibility, McIntire acknowledged that he committed the offense charged. That is not the same as being remorseful for having perpetrated that offense.